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Supreme Court of the United States

October Term, 1979

79-1197

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

MERCY HOSPITAL ASSOCIATION

BRIEF IN OPPOSITION TO THE NATIONAL LABOR RELATIONS BOARD'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PUTNEY, TWOMBLY, HALL & HIRSON
Attorneys for Mercy Hospital Association
250 Park Avenue
New York, N. Y. 10017

Of Counsel:
Edward F. Callan
Joseph F. Porrino

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West Suburban Hospital, 224 NLRB No. 100, 92 LRRM 1369, 1371 (1976), *enforcement denied, N.L.R.B. v. West Suburban Hospital,* 570 F.2d 213 (7th Cir. 1978) 5, 9

STATUTES AND RULES

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 88 Stat. 395; 29 U.S.C. Sec. 151, *et seq).*

Section 8(a)(1) 3

Section 8(a)(5) 3

MISCELLANEOUS

S. 2292, 93d Cong., 1st Sess. (1973) 6

S. Rep. No. 766, 93d Cong., 2d Sess., p. 5 (1974) Legis. Hist. 12, 113, 362-363 6

H.R. Rep. No. 1051, 93d Cong., 2d Sess., pp. 6-7 (1974) Legis. Hist. 274-275 7

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This brief is submitted on behalf of Mercy Hospital Association ("the Hospital") in opposition to the petition for a writ of certiorari filed with the Court by the Solicitor General of the United States on behalf of the National Labor Relations Board ("the Board"). (16a-28a)

OPINIONS BELOW

The opinion of the Court of Appeals (1a-13a) is reported at 606 F.2d 22 (2nd Cir. 1979). The Board's Decision and Order are reported at 238 N.L.R.B. No. 145 (1978). (16a-28a)

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

STATEMENT OF THE ISSUE PRESENTED

Whether the Court should grant the Board's petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit denying enforcement of the Board's order that the Hospital bargain with a union as the collective bargaining representative of the Hospital's maintenance and engineering department employees.

STATEMENT OF THE CASE

This case is before the Court upon the Board's petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered September 4, 1979.

A. The Representation Proceeding

On September 26, 1977, the International Union of Operating Engineers, Local 30-30A, AFL-CIO (the "Union") filed with Region 29 of the Board a petition for certification as the exclusive bargaining representative of the Hospital's full-time and regular part-time maintenance and engineering employees. (A. 12)[1] The Hospital's position was that the unit sought by the Union was inappropriate for the purpose of collective bargaining in light of officially reported Board precedent holding that maintenance and engineering employees should be included in a broad service and maintenance unit. The Hospital also brought to the Board's attention that its maintenance and engineering employees had voted two years earlier in a Board election in a broad service and maintenance unit.

Hearings on the issue of the appropriateness of the unit were conducted, and on November 11, 1977, the Board's Regional Director issued a Decision and Direction of Election, finding that a separate unit of maintenance and engineering employees was appropriate for collective bargaining. (29a)

On December 1, 1977, the Hospital filed with the Board a Request for Review of the Regional Director's Decision and Direction of Election, contending that a substantial question of law and policy was raised by the Regional Director's departure from officially reported Board precedent. The Hospital argued that the Decision contravened the Congressional admonition against the undue proliferation of bargaining units in the health care industry and that the unit was inappropriate since employees in the Hospital's engineering and maintenance department did not have a separate and identifiable community of interest which would justify placing them in a unit separate and apart from the Hospital's other service and maintenance employees.

[1] The designation "A." refers to the Appendix in the Court below.

The Board denied the Hospital's Request for Review, and on December 8, 1977, an election was conducted in which a majority of the employees in the unit selected the Union as their collective bargaining representative. On December 20, 1977, the Regional Director issued a Certification of Representative. (A.103)

B. The Unfair Labor Practice Proceeding

By letter dated February 2, 1978, the Union requested the Hospital to commence negotiations. On February 24, 1978, the Hospital advised the Union that it would not enter into the requested negotiations unless and until the question of the appropriateness of the unit was reviewed by the United States Court of Appeals for the Second Circuit. (A.2)

The Union thereafter filed an unfair labor practice charge with the Board, alleging a violation of Sections 8(a)(1) and 8(a)(5) of the Act.

On August 9, 1978, the Board's General Counsel moved for summary judgment on the ground that the Hospital was not entitled to relitigate the issues previously litigated in the representation proceeding. (A.2)

On September 29, 1978, the Board issued its Decision and Order (16a), granting the Motion for Summary Judgment and concluding that the Hospital had engaged in unfair labor practices within the meaning of Sections 8(a)(5) and (1) of the Act by refusing to bargain with the Union as the exclusive bargaining representative of the employees in the unit found appropriate by the Board. The Board's Order required the Hospital to bargain with the Union in a unit described as follows:

> All full-time and regular part-time maintenance and engineering employees, including maintenance workers, maintenance mechanics, electricians, gardeners, groundsmen, carpenters, painter/plasterers, plumbers, boilermen, watch engineers and chauffeurs employed by the Employer at its Rockville Centre, New York location, excluding all other employees, guards, and all supervisors as defined in the Act. (23a)

C. The Enforcement Proceeding

After the Hospital refused to comply with the Board's Order, the Board filed with the United States Court of Appeals for the Second Circuit a Petition for Enforcement of its Order. On September 4, 1979, the Second Circuit entered its Judgment, denying enforcement of the Board's Order and remanding the case to the Board for further proceedings to consider "... the propriety of the certified unit under a standard affording appropriate deference to the mandate of Congress." (2a)

No action has been taken by the Board pursuant to the Second Circuit's remand.

PRELIMINARY STATEMENT AND SUMMARY OF ARGUMENT

The central issue in this case is the standard to be applied by the Board in determining the appropriateness of a unit confined to the maintenance and engineering department employees of a health care institution in light of the mandate of Congress that there be no proliferation of bargaining units in the health care industry. The Second, Third and Seventh Circuit Courts of Appeals have addressed this specific issue. Each has held that the standard applied by the Board has conflicted with Congress' direction that there be no fragmentation of bargaining units within the health care field. Accordingly, each Circuit has denied enforcement of Board orders that a hospital bargain in a unit confined to maintenance and engineering employees.

Not only is there no conflict between the various circuit courts, there is in fact unanimity. Under such circumstances, review by the Court is neither necessary nor warranted.[2]

[2] In addition, the Court below remanded the case to the Board for consideration of the propriety of the unit "... under a standard affording appropriate deference to the mandate of Congress" (2a) and for "... an independent evaluation of the factors in this particular hospital." (13a) The Board has never acted pursuant to the remand. In the absence of such action in accordance with the remand, review of the instant case by this Court is premature. *Brotherhood of Locomotive Firemen & Engineermen v. Bangor & Aroostook Railroad Co.*, 389 U.S. 327 (1967).

ARGUMENT

REVIEW SHOULD NOT BE GRANTED SINCE THE SECOND CIRCUIT'S DECISION IS NOT IN CONFLICT WITH DECISIONS OF THE VARIOUS COURTS OF APPEALS

In its Petition for a Writ of Certiorari, the Board offers only one basis on which the Petition should be granted. It contends that review should be granted because

> "The court of appeals' decision, together with similar decisions in other circuits, has created considerable confusion regarding the standard the Board should apply in making bargaining unit determinations in the health care industry." (Petition, p. 11) (footnote omitted)

Quite the contrary is true. The Second Circuit's decision is fully in accord with the decisions of the Third and Seventh Circuits,[3] each of which has held that a separate maintenance unit is inappropriate under the Congressional mandate. In short, all of the circuit courts who have addressed the question are in agreement. Moreover, if indeed any confusion exists, it is attributable to the Board's radical "about-face" on the issue of the appropriateness of separate maintenance units.

At the time that Congress was considering the amendments to the Act bringing non-profit hospitals under the jurisdiction of the Board, it was seriously concerned about the stability of labor relations in this unique field. Its objective was to minimize the disruption and interruption of the care of the sick.

[3] *Allegheny General Hospital v. N.L.R.B.*, 239 N.L.R.B. No. 104 (1978), *enforcement denied*, 608 F.2d 965 (3rd Cir. 1979); *St. Vincent's Hospital v. N.L.R.B.*, 567 F.2d 588 (3rd Cir. 1977); *West Suburban Hospital v. N.L.R.B.*, 570 F.2d 213 (7th Cir. 1978); *Mary Thompson Hospital v. N.L.R.B.*, 242 N.L.R.B. No. 83 (1979) *enforcement denied,* . F.2d , (7th Cir. No. 79-1374, March 5, 1980, *BNA Daily Labor Report,* March 18, 1980, pp. D-1 through D-4).

With this objective in mind, Congress addressed itself to the question of bargaining units in the hospital industry. Senator William Taft of Ohio stated:

> "The issue of proliferation of bargaining units in health care institutions has also greatly concerned me during consideration of legislation in this area. Hospitals and other types of health care institutions are particularly vulnerable to a multiplicity of bargaining units due to the diversified nature of the medical services provided patients. If each professional interest and job classification is permitted to form a separate bargaining unit, numerous administrative and labor relations problems become involved in the delivery of health care."[4]

During the Congressional debates, there were extensive discussions with respect to the manner in which the Board was to implement this policy of non-proliferation. Senator Taft introduced a bill which would have restricted the Board's unit determinations in hospital cases by limiting hospital bargaining units to four types (service and maintenance, technical, clerical and professional). (S. 2229, 93rd Cong., 1st Sess.) This approach was rejected, and Congress decided to leave to the Board its statutory role of making unit determinations. This concession to the Board, however, was not without its restrictions. Senator Taft stated:

> "I believe this is a sound approach and a constructive compromise, as the Board should be permitted some flexibility in unit determination cases. I cannot stress enough, however, the importance of great caution being exercised by the Board in reviewing unit cases in this area. Unwarranted unit fragmentation leading to jurisdictional disputes and work stoppages must be prevented." (Legis. Hist., *supra,* at 113)

Congress made clear in enacting the amendments that while the Board retained the authority to make unit determina-

[4] "Legislative History of the Coverage of Non-Profit Hospitals under the National Labor Relations Act 1974" ("Legis. Hist."), S. Rep. No. 93-766 (1974) 93rd Cong., 2d Sess. 5 at 113.

tions in the health care industry, it was to do so in accordance with the explicit expression of Congressional policy to avoid proliferation of bargaining units. The House and Senate Reports[5] contained the following statement:

> "Due consideration should be given by the Board to preventing proliferation of bargaining units in the health care industry. In this connection the Committee notes with approval the recent Board decisions in *Four Seasons Nursing Center,* 208 NLRB No. 50, 85 LRRM 1093 (1974), and *Woodland Park Hospital,* 205 NLRB No. 144, 84 LRRM 1075 (1973), as well as the trend toward broader units enunciated in *Extendicare of West Virginia,* 203 NLRB No. 170, 83 LRRM 1242 (1973).[1]

"[1]By our reference to *Extendicare,* we do not necessarily approve all of the holdings of that decision."

Following the amendments, the Board grappled with the delicate and sensitive issues surrounding hospital bargaining units. The lead case on the issue of separate maintenance units, *Shriners Hospitals,* 217 NLRB 806 (1975), contains a searching analysis of the standard that the Board would utilize in addressing itself to this issue. The Board stated:

> "We are mindful that, under ordinary circumstances, units similar to the one requested here have been found appropriate in other industries, but ordinary circumstances do not exist here.... Congress recognized that labor relations in the health care industry require special considerations due to the uniqueness of that industry in terms of the service it provides to the sick, infirm, or aged. It is in the context of the peculiar nature of the industry and the Congressional mandate against the proliferation of bargaining units that we have weighed all of the criteria traditionally considered when making a unit determination and have, on balance, concluded that it is proper to place

[5] Legis. Hist., S. Rep., *supra,* at 12; H. Rep. No. 93-1501, 93rd Cong., 2d Sess. 6-7 (1974) at 274-275.

special significance on the high degree of integration of operations performed throughout a health facility." *Id.* at 808

The Board later retreated somewhat from this position in *Jewish Hospital of Cincinnati,* 223 NLRB 614 (1976). Again rejecting as inappropriate a separate maintenance unit, the Board noted that "... the desire for non-proliferation does not, in our judgment, necessarily preclude our granting maintenance units in the health care area." *Id.* at 616.

Addressing the question whether the employees in the unit sought in that case possessed a sufficiently separate community of interest to warrant a separate unit, the Board concluded that they did not and stated:

> "However, hospitals are composed of a number of departments each of which, in a general sense, could be said to be made up of skilled employees performing duties which are functionally distinct. The real question is whether the distinction between engineering department employees and the employees in other departments show such separate interests as to warrant granting engineering department employees a separate unit while not permitting skilled employees in other departments the same privilege." *Id.* at 617

On the same day that *Jewish Hospital* was decided, the Board found appropriate a unit confined to a hospital's boiler operators. *St. Vincent's Hospital,* 223 NLRB 638 (1976), *enforcement denied, St. Vincent's Hospital v. N.L.R.B.,* 567 F.2d 588 (3rd Cir. 1977). This case signalled the beginning of the change in the Board's approach to separate maintenance units. Two months later, the Board found appropriate a unit comprised of a hospital's maintenance department employees. Over the strong dissent of two of its members, the Board concluded that the department constituted "... a distinct and homogenous unit whose employees share a community of interest." *West*

Suburban Hospital 224 NLRB 1349, 1351 (1976), *enforcement denied, N.L.R.B. v. West Suburban Hospital* 570 F.2d 213 (7th Cir. 1978). The Board did not even attempt to distinguish its earlier decision in *Jewish Hospital;* nor did it discuss its departure from the standard it had set for itself in *Shriners Hospitals* and *Jewish Hospital.*

In late 1977, the Court of Appeals for the Third Circuit denied the Board's application for enforcement in the *St. Vincent's Hospital* case. The Court particularly criticized the Board for utilizing its "traditional criteria" in making unit determinations in the health care field. It stated:

> "... Congress directed the Board to apply a standard in this field that was not traditional.... The Board therefore should recognize that the contours of a bargaining unit in other industries does not follow the blueprint Congress desired in a hospital." 567 F.2d at 592.

The Court then undertook to outline for the Board what the Congressional mandate meant.

> "Similarly, the factors of the amount of contact between workers, separate immediate supervision and the special skills of certain crafts must be put in balance against the public interest in preventing fragmentation in the health care field. A mechanical reliance on traditional patterns based on licensing, supervision, skills and employee joint activity simply does not comply with the Congressional intent to treat this unique field in a special manner." *Id.*

The Board's "mechanical reliance" on traditional factors was similarly subjected to criticism in the Seventh Circuit's decision in *West Suburban Hospital, supra.* The Court found that the Board's decision violated the Congressional admonition and criticized "... the Board's mere lip-service mention of the Congressional admonition as a factor to be taken into account, without any indication from the Board as to a manner in which its unit determination in this case implemented or reflected that admonition." 570 F.2d at 216.

In December, 1978, the Board decided to reconsider its earlier decision in *Allegheny General Hospital, supra,* in light of the decisions of the Third Circuit in *St. Vincent's Hospital, supra,* and *Memorial Hospital of Roxborough,* 545 F.2d 351 (3rd Cir. 1976). The Board stated that, after a review of the legislative history, it had concluded that Congress had not intended to prohibit the Board from finding separate maintenance and engineering units appropriate. It also noted that it disagreed with the Third Circuit's conclusion in *St. Vincent's Hospital* that the Board was precluded from relying on its traditional criteria in making health care unit determinations. *Allegheny General Hospital,* 239 NLRB No. 104.

The Board stated that its analysis of the legislative history had led the Board to conclude that Congress had intended that the Board utilize its traditional community of interest criteria, i.e., similarity of wages and hours, extent of common supervision, frequency of contact, degree of interchange and functional integration, and area practice. With respect to the Congressional admonition against the proliferation of hospital bargaining units, the Board stated that Congress intended "... that the Board should consider proliferation *as a factor* in making unit determinations in the health care industry and that it was not necessary to amend Section 9(b) in order for the Board to do so." 239 NLRB No. 104 (Slip opinion p. 7) (emphasis supplied) The Board then proceeded to announce, over the strong dissent of member Penello, that it would apply the tests of *American Cyanamid Co.,* 131 NLRB 909 (1961) to determine the appropriateness of maintenance units in the health care industry. *Id.* at p. 21[6]

The Board's defense of its position was rejected by the Second Circuit in the instant case. Noting that the Board had adopted the Regional Director's opinion "without further elaboration" (12a), the Court stated:

> "Our reading of the legislative history leads us to conclude that in the 1974 amendment Congress was

[6] *American Cyanamid* is the lead Board case with respect to the appropriateness of separate maintenance units in an industrial setting.

> expressing concern not only that health care institutions be spared the egregious unit proliferation of the construction trades but that less extreme unit fragmentation arising from application of usual industrial unit criteria could also impede effective delivery of health care services. Thus, we hold along with our sister circuits that when the Board makes a unit determination for health care institution employees, traditional community of interest factors 'must be put in balance against the public interest in preventing fragmentation in the health care field.' " 11a (citations omitted)

The Board's position was similarly rejected by the Third Circuit when it reviewed the Board's order in *Allegheny General Hospital v. N.L.R.B., supra.* In refusing to overrule its earlier decisions in *Memorial Hospital of Roxborough v. N.L.R.B., supra,* and *St. Vincent's Hospital v. N.L.R.B., supra,* the Court stated:

> "We have no intention of reappraising the determinations of two relatively recent decisions of this court, especially when the Board has failed to cite subsequent events that would render those decisions no longer tenable. Indeed, since these decisions two other circuits have expressly relied on them in reviewing orders of the NLRB. The United States Courts of Appeals for the Second and Seventh Circuits have recently refused to enforce Board orders that were based on use of traditional bargaining unit standards to determine hospital bargaining units. *NLRB v. Mercy Hospital Assoc.,* 606 F.2d 22, at 26-28 (2d Cir. 1979); *NLRB v. West Suburban Hospital,* 570 F.2d 213, 216 (7th Cir. 1978). . . . Instead of reappraising determinations that have been endorsed by our sister circuits, we must reaffirm certain fundamental tenets of the doctrine of *stare decisis* and thus reassert the power of the federal judiciary to interpret statutes enacted by Congress. 608 F.2d at 969

Just recently, the Seventh Circuit denied enforcement to a Board order requiring a hospital to bargain in a unit restricted to four stationary engineers. *Mary Thompson Hospital v.*

N.L.R.B., F.2d (7th Cir. No. 79-1374, March 5, 1980, *BNA Daily Labor Report,* March 18, 1980, pp. D-1 through 4). The Court criticized the Board for its "flagrant disregard of judicial precedent" *Id.* at D-3 and took the occasion to remind the Board that:

> "... we must look to decisions by courts of appeals — not to decisions by the Board — in determining how properly to consider the congressional admonition. As a review of the relevant cases will show, *courts of appeals have consistently rejected a strict reliance on a traditional community of interest analysis in a hospital setting." Id.* at D-2 (emphasis supplied)

The various decisions of the Second, Third and Seventh Circuits[7] leave no room for doubt or uncertainty on the question of the propriety of a unit determination which sanctions the placement of maintenance employees in a small and separate grouping. The circuits all agree that such a unit determination is impermissible under the policy enunciated by Congress in amending the Act. There is no conflict to be resolved by this

[7] The Ninth Circuit has also addressed itself to the issue of the standard that the Board must apply in making health care unit determinations. *N.L.R.B v. St. Francis Hospital of Lynwood,* 601 F.2d 404 (9th Cir. 1979). In denying enforcement to a Board order requiring the hospital to bargain in a unit confined to registered nurses, the Court stated: "From the legislative history of the 1974 Amendments to the Act, it is apparent that Congress sought to encourage the Board to find broader bargaining units in the health care industry rather than narrower ones." *Id.* at 414 The Court then went on to declare:

> "We view the language and the remaining legislative history of the 1974 Amendments to the Act as requiring the Board to determine not the similarities among employees in the same job classification (indeed the fact that they share the same classification would inevitably lead to the discovery of many similarities), but instead the 'disparity of interests' among employee classifications which would prevent a combination of groups of employees into a single broader unit thereby minimizing unit proliferation. The congressional approval of the trend toward broader units in the health care industry indicates an awareness that the traditional factor of community of interest would be subordinated to the directive against undue proliferation." *Id.* at 419

Court. There are no ambiguities or inconsistencies to be clarified by this Court. The Board's sole basis for seeking review, the purported "confusion regarding the standard the Board should apply in making bargaining unit determinations in the health care industry" (Petition, p. 11) is simply the Board's way of saying that it disagrees with the decisions of the circuit courts. In light of the unanimous agreement among the circuits on the standard to be applied by the Board, intervention by this Court is not now necessary.

CONCLUSION

In view of the fact that the Board has failed to establish any basis for review under Rule 19 of the Rules of this Court, the petition for a writ of certiorari should be denied.

Respectfully submitted,

PUTNEY, TWOMBLY, HALL & HIRSON
Attorneys for Mercy Hospital
Association
250 Park Avenue
New York, New York 10017

Of Counsel:

Edward F. Callan
Joseph F. Porrino